IN THE SUPREME COURT OF THE STATE OF NEVADA

JAY H. HERMAN A/K/A JAY HERMAN COLE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57644

FILED

MAY 09 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of driving and/or being in actual physical control while under the influence of a controlled substance. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellant Jay H. Herman contends that NRS 484.379 (currently codified as NRS 484C.110) is unconstitutionally vague because it fails to identify what amounts of controlled substances are impermissible and "subjects anyone on prescription pain medicine to immediate arrest and incarceration if they are driving a car;" therefore, the statute fails to provide sufficient notice of what conduct is prohibited and encourages arbitrary and discriminatory enforcement. See State v. Castaneda, 126 Nev. ___, ___, 245 P.3d 550, 553 (2010) (a statute is unconstitutionally vague if it fails to provide sufficient notice to enable an ordinary person to understand the conduct that is prohibited or is "so standardless" as to encourage or authorize discriminatory enforcement (internal quotation omitted)). We review the constitutionality of a statute de novo. Ford v. State, 127 Nev. ___, ___, 262 P.3d 1123, 1126 (2011). Statutes are presumed to be valid and the challenger bears the burden of

demonstrating their unconstitutionality. Nelson v. State, 123 Nev. 534, 540, 170 P.3d 517, 522 (2007).

NRS 484C.110(2) makes it unlawful for a person to drive or be in actual physical control of a vehicle on premises to which the public has access while under the influence of a controlled substance. Here, Herman was involved in an accident in the parking lot of a grocery store. The arresting officer testified that when he arrived at the scene, Herman was sitting behind the wheel of his truck with the engine running and his foot on the brake. Herman was not coherent and unable to follow the officer's repeated instruction to produce his license and insurance. He was unable to stand; his eyes were bloodshot, watery, and droopy; his speech was slurred, mumbled, confused, and slow and he had soiled himself. Herman failed the horizontal gaze nystagmus test. A bottle of hydrocodone, prescribed to Herman, was found in his truck and blood tests revealed that he had 140 nanograms per milliliter of the drug in his blood shortly after the accident. Hydrocodone is a schedule II controlled substance. See NRS 0.031; NAC 453.520.

We conclude that Herman's facial vagueness challenges fails because his conduct was clearly proscribed by NRS 484C.110(2). See Holder v. Humanitarian Law Project, 561 U.S. ___, ___, 130 S. Ct. 2705, 2719 (2010) (a person "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others" (internal quotations omitted)). Further, the statute provides persons of ordinary intelligence fair notice of what conduct is forbidden and does not encourage arbitrary and discriminatory enforcement; therefore, vagueness does not "permeate" its text. Flamingo Paradise Gaming v. Att'y General, 125 Nev. 502, 512-13, 217 P.3d 546,

553-54 (2009); Holder, 561 U.S. at ___, 130 S. Ct. at 2718; cf. Sheriff v. Burcham, 124 Nev. 1247, 1256-57, 198 P.3d 326, 332 (2008) (defining the term "under the influence" as used in NRS 484.3795 and concluding that its plain meaning fulfills due process requirements); Slinkard v. State, 106 Nev. 393, 395, 793 P.2d 1330, 1331 (1990) (a person who consumes a significant amount of alcohol and then drives is on notice that he may have a prohibited percentage of alcohol in his blood).[1] Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Douglas, J.

Gibbons, J.

Parraguirre, J.

cc: Hon. Douglas W. Herndon, District Judge
Law Office of Joshua L. Harmon
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

[1]To the extent Herman contends that the statute is unconstitutionally vague because NRS 484C.110(2)(c) is "logically inconsistent," he lacks standing to challenge that provision of the statute because he was not convicted of violating that provision. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).